No. 94-1021

(3)

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

vs.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES RAMEY AND POLK COUNTY, IOWA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

LIST OF PARTIES

Polk County was a party at the district court level and on appeal to the Eighth Circuit (*See* Petition for Writ, pps. A1, A8). Polk County is not named as a party in the caption in the petition for writ of certiorari. It is assumed for purposes of this brief in opposition that Polk County is a party and the failure to include it as such was an unintentional omission on the part of the petitioners. Assistant Polk County Attorney James Ramey was named as a party in the petition for writ of certiorari.

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OPINIONS BELOW

The petition for writ of certiorari includes a district court ruling on a summary judgment motion made by the defendants City of Des Moines and those other defendants employed by the Des Moines Police Department. The petition for writ of certiorari does not include the district court ruling upon cross motions for summary judgment made by Mr. and Mrs. White and defendants Polk County and James Ramey. That ruling is included in this brief in opposition as Appendix A.

The opinion of the Eighth Circuit Court of Appeals regarding this case is *White v. Moulder*, 30 F.3d 80 (8th Cir. 1994).

STATEMENT OF THE CASE

The facts in this case are undisputed, as established in cross motions for summary judgment. *See* App. A, attached hereto. On November 8, 1990, police officers for the City of Des Moines, including petitioner Ronald White, searched a residence. (App. A, p. A2). They seized cash and a lottery ticket, and photographed this evidence. *Id.* The following day, petitioner Jodi White, wife of Officer White, cashed the lottery ticket seized in the search. (App. A, p. A2).

In April, 1991, police officer Foster discovered that a list of serial numbers of the bills seized in the earlier search did not exactly match the bills held by the city police department. Officer Foster advised Assistant Polk County Attorney Ramey of the discrepancy at that time.

Ramey advised Foster to keep his field notes of the discrepancy, but Ramey did not obtain a copy of the field notes. (App. A, p. A2).

On May 9, 1991, officer White was charged with one count of theft, based upon a one hundred dollar bill which was missing from the seized moneys and the lottery ticket which had been cashed by Jodi White. On August 29, 1991, a district associate judge ordered the prosecution to produce exculpatory evidence. (Petition, pp. 3-4).

In September, 1991, Officer White was tried for theft in the third degree. Prosecutor Ramey did not disclose the serial number mismatch prior to trial. When the mismatch was learned of at trial, the court excluded the money from evidence and instructed the jury to disregard all testimony about the seized cash. (App. A, p. A3). The State later moved for a mistrial, which White resisted. He was thereafter tried for theft on the evidence of the missing lottery ticket. White was acquitted of the charge. (App. A, p. A3).

Petitioners made a number of significant misstatements or omissions of fact in their petition.

Petitioners say, "On August 29, 1991, Associate District Judge Patricia Houlihan ordered the prosecuting attorney, respondent Ramey, to produce any exculpatory evidence. Ramey failed to comply, instructing respondent Foster to withhold field notes containing identifying information regarding the missing bill and ticket." (Petition, pp. 4-5). The undisputed facts as found by the district court show that this quotation contains no less than four misstatements. First, the conversation between

Ramey and Foster concerning the field notes occurred on or about April 26, 1991, fully four months before Judge Houlihan's order, not after it. (App. A, p. A2). Second, Ramey did not instruct Foster to "withhold" the field notes, but rather to preserve them and keep them. (App. A, p. A7). Third, the field notes did not contain any "identifying information" about the missing bill or the lottery ticket. Rather, the field notes made note of the discrepancy between the bills and the serialized list of the bills prepared by Foster and Noel. Nothing about the missing one hundred dollar bill was contained in the field notes. (App. A, p. A2). Fourth, and finally the field notes contained only information concerning the bills and contained no information concerning the missing lottery ticket. (App. A, p. A2).

Petitioners say, "Respondent Ramey gave legal advice to the police officers involved and determined that certain evidence, field notes, should be left in their files." (Petition, p. 7). In reality, the district court found that, " . . . Ramey's statement was not 'advice' at all." (App. A, p. A7).

Petitioners continue, "Additionally, he [Ramey] participated in the bill serialization itself, a function normally performed by a detective or police officer." (Petition, p. 7). This is absolutely false. Ramey did not participate in the serialization. Police officers Foster and Noel did participate in the serialization. (App. A, p. A2).

Petitioners imply that the failure to disclose exculpatory evidence about the bills caused Ronald White to be put to the rigors of trial, and that, "the very fact that that

petitioner was required to defend himself at a trial seriously prejudiced him." (Petition, p. 5). What petitioners fail to state is that regardless of the effect of the exculpatory evidence upon the charge of stealing the one hundred dollar bill, the charge against Ronald White also was based on theft of a fifty dollar lottery ticket. (App. A, p. A2). Petitioners fail to mention that Jodi White cashed the missing lottery ticket one day after her husband led the search in which the ticket was seized. (App. A, p. A2). Thus, Ronald White would have stood trial in any event upon the theft charge.

Petitioners also neglect to tell the Court that after the discrepancy between the serialized list and the bills became known, the bills and the list were excluded from evidence at Mr. White's trial and the jury was instructed to disregard all testimony about the bills. (App. A, p. A3). Finally, petitioners do not mention that Ronald White had it in his power to effect a remedy for all the unfairness he claims to have suffered at trial. The State made a motion for a mistrial and Ronald White resisted the same. (App. A, p. A3).

REASONS FOR NOT GRANTING THE WRIT

I. WHETHER THE COURT OF APPEALS ERRED IN RULING, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, THAT PETITIONER WHITE RECEIVED A FAIR TRIAL.

Petitioners claim that the court of appeals held that Mr. White received a fair trial, and that this determination was based solely on his acquittal. Petitioners then

claim that the decision of the Eighth Circuit Court of Appeals in this case is in direct conflict with *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994). Petitioners' characterization of the court of appeals' decision is inaccurate. In addition, there is no conflict between the decisions of the Eighth Circuit Court of Appeals and the Ninth Circuit Court of Appeals.

The Eighth Circuit in this case held that Mr. White's trial was not fundamentally unfair. (Petition, pp. A4-A5). The Court of Appeals looked at the totality of circumstances surrounding the trial, including that the mistakes in inventory were disclosed during trial, that the trial court prevented unfair jury influence by striking all evidence about seized money and directing the jury to disregard the evidence, and that Mr. White was acquitted. (Petition, pp. A4-A5). The court did not, as petitioners claim, rule that White received a fair trial solely based on his acquittal.

The Ninth Circuit decision in *Haupt v. Dillard* is in harmony with the Eighth Circuit decision in this case. In *Haupt*, the Ninth Circuit considered whether, as a matter of law, an acquittal defeats a defendant's claim for denial of the right to a fair trial. *Haupt v. Dillard*, 17 F.3d at 287, 288. The Ninth Circuit held that an acquittal does not automatically erase all injury. The Eighth Circuit's decision in this case did not hold that an acquittal, as a matter of law, precludes a cause of action for denial of due process. Rather, the Eighth Circuit examined the totality of circumstances surrounding White's trial, and concluded that he received a fair trial. Therefore there is no conflict between the decisions of the Ninth Circuit in *Haupt* and the Eighth Circuit in this case.

In addition, the Eighth Circuit in its ruling relied on *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1974). *Christman* recognized that an acquittal in and of itself does not guarantee that a defendant received a fair trial. *Christman v. Hanrahan*, 500 F.2d at 68 n.2. The fact that the Eighth Circuit relied on *Christman* demonstrates that the Eighth Circuit did not consider that an acquittal automatically guarantees a fair trial. Both *Haupt* and the decision in this case are in perfect harmony, and are logical extensions of the Seventh Circuit decision in *Christman*.[1]

There is no conflict of law between circuits. The court of appeals correctly ruled that petitioner in this case received a fair trial, based on the totality of the circumstances. The petition for writ of certiorari should be denied.

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[1] Petitioners mischaracterize the facts in *Christman*. They assert that "The defendant in *Christman* was relieved of the burden of having actually to defend himself at trial where, prior to trial, the charges against him were dismissed." (Petition, p. 5). In actuality the defendant in *Christman*, like Mr. White here, was tried on criminal charges, and had exculpatory evidence come to light during his trial. He was acquitted by a jury. The Seventh Circuit, in reviewing the entirety of the circumstances, held that *Christman* received a fair trial. *Christman v. Hanrahan*, 500 F.2d at 68.

II. WHETHER THIS COURT SHOULD REVIEW A DETERMINATION OF PROSECUTORIAL IMMUNITY UNDER STATE LAW, WHERE THE ACTIONS WERE TRIAL PREPARATION AND TRIAL ITSELF.

The Supreme Court will not ordinarily grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); 17 Wright, Miller and Cooper, Federal Practice & Procedure § 4036, p. 41 (1988). The prosecutorial immunity defense was raised in response to a pendant state law claim for intentional infliction of emotional distress. (Petition, p. A 5-6). The court of appeals was deciding whether the prosecutor was immune under Iowa law. (Petition, p. A 5-6). This Court should refuse to review that determination.

In any event, Mr. Ramey is clearly entitled to the absolute prosecutorial immunity conferred upon him by the trial court and the Eighth Circuit. The actions he took – inexcusable or not — were taken in the context of trial preparation and trial itself. In this respect, he falls squarely under the umbrella of immunity created by this court in *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976).

Mr. Ramey did not give advice about hypnotizing a suspect prior to police questioning, as did the prosecutor in *Burns v. Reed*, 500 U.S. 478 (1991). Likewise, Mr. Ramey did not perform investigative functions normally undertaken by a police officer as did the prosecutor in *Buckley v. Fitzsimmons*. ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). All Mr. Ramey did, as part of his trial preparation, was receive an evidentiary briefing from an investigating officer and ask the officer to make a note of the

evidence to keep in the officer's files. Therefore, Mr. Ramey is entitled to absolute prosecutorial immunity.

Petitioners' reliance upon *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994) is entirely misplaced in the context of a discussion of prosecutorial immunity. Neither the facts of *Mendocino* nor its law have anything at all to do with petitioners' case. *Mendocino* concerns the appealability of a denial of a qualified immunity defense raised by law enforcement officers in a motion to dismiss. It also is concerned with the heightened pleading standard imposed upon the plaintiff in such a situation. Neither of these issues were before either the District Court or the Eighth Circuit in petitioners' case.

CONCLUSION

Because no inter-circuit conflict exists, because Mr. Ramey's entitlement to prosecutorial immunity is a state law question, and because Mr. Ramey was entitled to prosecutorial immunity in any event, respondents respectfully request the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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Appendix A. Opinion of the U.S. District Court, 7/21/92, upon cross motions for summary judgment by petitioners and respondents Polk County and James Ramey..... A1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RONALD WHITE and JODI WHITE, Plaintiffs, vs. WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, RONALD FOSTER and DAVID NOEL, in their official capacities as Police Officers of the City of Des Moines and in their individual capacities, POLK COUNTY, and CITY OF DES MOINES, Defendants.	*	NO. 4-92-CV-80006 ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT POLK COUNTY'S AND DEFENDANT JAMES RAMEY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ronald White was tried and acquitted of criminal charges in Polk County District Court. In addition, he was terminated from his employment as a police officer for the city of Des Moines. He and his wife now seek declaratory relief, injunctive relief, and compensatory damages to redress harms arising from his dismissal and prosecution.

Before the court are the plaintiffs' resisted motion for partial summary judgment and the resisted motion for summary judgment of defendants Polk County and James Ramey. On May 14, 1992, counsel presented arguments to the court on these motions. The court concludes that

these defendants are entitled to summary judgment in their favor and against both plaintiffs. The motions for summary judgment of Polk County and James Ramey are granted; the motions for partial summary judgment of Ronald White and Jodi White are denied.

I. Background.

The facts pertinent to these motions are not in dispute. On November 8, 1990, Des Moines police officers, including Ronald White, searched the residence of Ernest Draper and Marilyn Wilson. The officers discovered cash and a lottery ticket and took photographs of what they found. The following day, the lottery ticket, signed by Jodi White, was cashed.

On January 2, 1991, Polk County Attorney John Sarcone hired James Ramey as an Assistant Polk County Attorney. Sarcone knew when he hired Ramey that Ramey had been disciplined by the Iowa Supreme Court for having failed to pay income tax.

On April 26, 1991, law enforcement officials who executed the search warrant listed serial numbers of the bills that had been seized from the Draper/Wilson residence and entered into evidence in the Draper/Wilson trial. Officers Ronald Foster and David Noel discovered that the listed serial numbers did not correspond with the bills held by the Des Moines Police Department. They promptly advised Ramey of the discrepancy.

On May 9, 1991, Ramey filed charges against Ronald White. On May 31, 1991, White was terminated from his job as a police officer for the City of Des Moines.

From September 3-12, 1991, Ramey tried White for theft in the third degree. But Ramey did not disclose the serial number mismatch prior to trial. When White learned at trial of the mismatch, he moved for mistrial. The court denied the motion but excluded the money from evidence and instructed the jury to disregard all testimony about the seized cash. The judge presiding at the trial in Polk County District Court found "that the State knowingly, willfully, intentionally, and deliberately suppressed exculpatory evidence." Plaintiff's Exh. 2. The State later moved for mistrial; White resisted the motion and it was denied. The jury found him not guilty. The State did not bring criminal charges against Jodi White.

In count 1 of this action, plaintiff Ronald White alleges that Polk County did not conduct a reasonable background check prior to hiring Ramey. In count 7, plaintiff Ronald White alleges that defendant James Ramey, an Assistant Polk County Attorney, gave police officers unreasonable legal advice, initiated and filed charges against plaintiff Ronald White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during White's trial. In counts 5 and 6, plaintiffs Ronald White and Jodi White allege that Ramey and Polk County intentionally inflicted emotional distress upon them. Plaintiff Ronald White also has asserted claims against the City of Des Moines, Police Chief William Moulder, and Des Moines police officers Ronald Foster and David Noel, but those claims are not addressed by either of the pending motions for summary judgment.

II. Applicable Law.

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court reviews the summary judgment record in a light most favorable to the party resisting summary judgment. But once a defendant has demonstrated that an asserted claim lacks factual and legal support, summary judgment will be appropriate unless the plaintiff demonstrates that admissible evidence and a viable legal theory generate an issue for trial.

III. Discussion.

Counts 1, 5, 6 and 7 of the complaint are before the court. Ronald White seeks damages in counts 1, 5, and 7; Jodi White seeks damages only in count 6. "Plaintiff" shall refer to plaintiff Ronald White unless otherwise noted.

A. Section 1983 Claim Against Polk County.

Plaintiff Ronald White alleges in Count 1 that Polk County Attorney John Sarcone violated his constitutional right to a fair trial by failing to perform a background check on James Ramey before hiring Ramey as an Assistant County Attorney. The plaintiff alleges in Count 1 that

the county's policy or custom of not performing background checks on prospective employees, and in particular its negligent hiring of Ramey, violated plaintiff's constitutional right to a fair trial. Plaintiff relies on *Monell v. Department of Social Services*, 436 U.S. 658 (1978), although that case held that a municipality cannot be vicariously liable for an employee's unconstitutional act that deviates from the municipality's policy or custom. *Id.* at 690-91.

The Court of Appeals for the Eighth Circuit has held that county employees' unconstitutional acts constitute a policy or custom only where county officials are directly responsible for the unconstitutional acts of subordinates or are deliberately indifferent to their illegal conduct. *See, e.g., Harris v. City of Pagsdale*, 821 F.2d 499, 504 (8th Cir. 1987). If the allegedly illegal acts were not done at the express direction of county officials, the plaintiff must prove that county officials tacitly authorized the illegal acts by failing to take remedial steps after having knowledge of a pattern of illegal conduct by subordinates. *Id.* (citing *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986)).

Under this standard, plaintiff's claim must fail. He has not shown that Sarcone, simply by hiring Ramey, was directly responsible for Ramey's allegedly unconstitutional acts, which are separately alleged in Count 7. Nor has plaintiff shown that Sarcone was aware of a pattern of unconstitutional conduct and failed to remedy that conduct. In sum, Sarcone's conduct is not sufficiently related to Ramey's conduct to impose § 1983 liability on Polk County.

Defendant Polk County is entitled to summary judgment on Count 1 of the complaint.

B. Section 1983 Claim Against Ramey.

Plaintiff Ronald White has alleged in Count 7 that defendant James Ramey is liable under 42 U.S.C. § 1983 because he denied White his constitutional right to a fair trial. Specifically, White alleges Ramey gave police officers unreasonable legal advice, filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during the prosecution of White.

Ramey contends he is absolutely immune from plaintiff's allegations. Plaintiffs, on the other hand, contend Ramey is not entitled to absolute immunity because his actions were outside the ambit of his prosecutorial duties. This case is controlled by *Imbler v. Pachtman*, 424 U.S. 409 (1976), which held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. Thus, Ramey plainly has absolute immunity from a § 1983 action alleging that he filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during the prosecution of White. *See id.* at 424.

Ramey also has absolute immunity from plaintiff's allegation, contained in paragraph 3 of count 7, that Ramey "gave police officers unreasonable legal advice." White does not claim that Ramey's "advice" led to any action by the police that violated his constitutional rights.

Rather, plaintiff has alleged that Ramey advised Officer Foster to keep evidence that, if introduced at trial by Ramey, would have exculpated White. Contrary to the language of the complaint, Ramey's statement was not "advice" at all. The allegation concerns Ramey's "role as advocate for the State," which may include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *id.* at 431 n.33; the allegation does not concern "the role of an administrator or investigative officer." *Id.* at 430-31. This situation differs fundamentally from *Burns v. Reed*, 111 S.Ct. 1934 (1991), where a prosecutor was denied absolute immunity for advising police officers to hypnotize a criminal suspect in order to question her. *Id.* at 1937. Thus, Ramey has absolute immunity for all his actions that allegedly created liability under section 1983.

Defendant Ramey is entitled to summary judgment in his favor on Count 7 of the complaint.

C. Intentional Infliction of Emotional Distress.

Plaintiff Ronald White has alleged in Count 5, and plaintiff Jodi White has alleged in Count 6, that the defendants are liable to each of them for intentional infliction of emotional distress. Defendants have moved for summary judgment on this claim; plaintiffs have not responded to this portion of the motion.

To succeed on an intentional infliction of emotional distress claim, the plaintiffs must prove that (1) the defendants' conduct was outrageous; (2) the defendants intentionally caused, or had reckless disregard for the

probability of causing, emotional distress; (3) the plaintiffs suffered severe or extreme emotional distress; and (4) the defendants' outrageous conduct actually and proximately caused plaintiffs' emotional distress. *See Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984); *see also Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992).

The record before the court, even when viewed in a manner most favorable to the plaintiffs, fails to establish liability on this claim for either defendant. Neither Polk County's hiring of Ramey nor Ramey's conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting *Restatement (Second) of Torts* § 46, cmt. d (1965)).

Thus, defendants Polk County and James Ramey are entitled to summary judgment on Counts 5 and 6.

IV. Conclusion.

Plaintiffs' motion for partial summery [sic] judgment is denied. Defendants Polk County and James Ramey's motion for summary judgment is granted on Counts 1, 7, and those parts of Counts 5 and 6 that assert claims against them. Remaining in this case are Counts 2, 3, 4, and those parts of Counts 5 and 6 that assert claims against the City of Des Moines, William Moulder, Ronald Foster, and David Noel.

IT IS SO ORDERED.

Dated this 21 day of July, 1992.

/s/
CHARLES R. WOLLE,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT